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PROCEEDINGS AND ORDERS

DATE: 111984

CASE NBR 84-1-05191 CSY
SHORT TITLE James, Steven C.
VERSUS Arizona

DOCKETED: Aug 3 1984

Date	Proceedings and Orders
Aug 3 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Sep 5 1984	Brief of respondent Arizona in opposition filed.
Sep 6 1984	DISTRIBUTED. September 24, 1984
Sep 17 1984	Application for stay of execution filed with WHR (A-192)
Sep 17 1984	Order granting same by Rehnquist, J.
Sep 21 1984	Reply brief of petitioner Steven C. James filed.
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 29 1984	REDISTRIBUTED. November 2, 1984
Nov 5 1984	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

No. 84-171

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term of 1984

STEVEN CRAIG JAMES

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

Whether the Fifth and Fourteenth Amendments require suppression of Petitioner's post-arrest inculpatory statements and the fruits of a police-escorted journey, during which Petitioner led officers to the murder victim's body, all of which occurred after Petitioner invoked his right to consult an attorney before further interrogation.

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OPINION BELOW

The reported Opinion of the Arizona Supreme Court, holding that Petitioner's motion to supress his statements and the fruits of the police-escorted journey was properly denied and affirming Petitioner's conviction and death sentence, is attached as Appendix "A" to this Petition.

JURISDICTION

The Opinion of the Arizona Supreme Court affirming Petitioner's conviction and death sentence was rendered on June 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provided, in pertinent part:

> "No person... shall be compelled in any criminal case to be a witness against himself..."

The Fourteenth Amendment to the Constitution of the United States provided, in pertinent part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Petitioner Steven Craig James was arrested on November 19, 1981, by the City of Phoenix Police Department on suspicion of involvement in the murder of one Juan Maya. At the time of his arrest, Sergeant Michael Midkiff was supervising the investigation regarding Maya's disappearance.[1/] Detective Russell Davis was acting as the designated "primary investigator".[2/] Upon arriving at the police investigative headquarters, Steven James was taken to a small, windowless interrogation room by Detective Davis.[3/] Detective Davis read James his Miranda rights and then asked James if he understood those rights. James answered, simply, "yes".[4/] James was advised that he was being charged with first degree murder and that the police had information implicating him in the murder of Juan Maya.[5/] According to Detective Davis, the following exchange then took place:[6/]

> A. We were nineteen minutes into the interview, he asked about what would happen to him on this murder charge and I advised him that it was up to him if he was found guilty, I advised him that would be up to the court, and it was after that that he requested an attorney.
>
> Q. Did you respond to that request?
>
> A. Yes, I did.

1/ Reporter's Transcript of Proceedings ("RT"), August 27, 1982, page 41. (See Appendix "B").

2/ Id.

3/ RT, September 3, 1982, page 5-7 (See Appendix "C")

4/ Id.

5/ RT, September 30, 1982, page 1128.

6/ RT, September 3, 1982, pages 8-10 (Appendix "C"). Detective Davis testified that the interview was not tape recorded because, "I get a better rapport with the subject I'm interviewing by not tape recording." page 8, lines 22-23.

> Q. What did you say?
>
> A. I told him I was only trying to get the facts of the case and giving him an opportunity to tell his side of it too, and if he wanted an attorney it was up to him. I asked him again if he wanted an attorney.
>
> Q. What did he say?
>
> A. He hesitated and he said something to the effect that he didn't believe he needed one, then he stopped and said that he did need one.

Detective Davis then rose, picked up his papers and opened the door to the interrogation room.[7/] As he opened the door, Sergeant Midkiff was standing on the other side of the door.[8/] At that moment, Sergeant Midkiff inquired in a normal tone of voice, "is he going to show us where the body is?"[9/] James responded, "I'll show you where the body is."[10/] Sergeant Midkiff related the incident as follows:[11/]

> Q. You stated that you directed a question to Detective Davis, would you advise the Court what you asked Detective Davis?
>
> A. I asked him if he is going to show us where the body is.
>
> Q. And, what was Detective Davis' response?
>
> A. Well, prior to Detective Davis giving you a response, a spontaneous response, as I would describe it, was given by Steven James.

7/ RT, September 3, 1982, page 11 (Appendix "C")

8/ Id.

9/ RT, August 27, 1982, page 44, line 14 (Appendix "B")

10/ RT, August 27, 1983, page 44, line 20. (Appendix "B"); RT, September 3, 1982, pages 11-12.

11/ RT, August 27, 1982, pages 44 to 46.

Q. What did Steven James say?

A. He said I'll show you where the body is, I'll take you to the body, or words to that effect.

Q. Did you ask him any questions at that point?

A. No, well, I asked him where it was.

Either simultaneous to James' statement or shortly following it, Detective Davis informed Sergeant Midkiff that James had invoked his right to an attorney.[12/]

Although both Midkiff and Davis contend that Midkiff's question was directed solely to Davis, Sergeant Midkiff agreed that James was with in hearing distance, that Detective Davis was "standing pretty close" to James and that James "might have assumed" that the question was directed to him.[13/] Both officers agree that James' statements were in direct response to Midkiff's question.[14/]

As demonstrated by the testimony set forth above, Midkiff then asked James directly where the body was. James apparently responded to Midkiff by telling the officers that it was one hundred miles from Phoenix.[15/] The officers then began making arrangements for a car so that James could direct them to the site.[16/]

James remained in the interrogation room for approximately an hour while preparations were being made.[17/]

12/ RT, August 27, 1982, pages 45 and 48. (Appendix "B"); RT, September 3, 1982, pages 12-13.

13/ RT, August 27, 1983, page 52-53. (Appendix "B").

14/ Id: RT, September 22, 1982, page 22. (Appendix "C")

15/ RT, September 3, 1982, page 13. (Appendix "C")

16/ Id.

17/ RT, August 27, 1982, page 46. (Appendix "B").

Neither detective Davis nor Sergeant Midkiff made any effort to provide James with an attorney.[18/] The officers assumed they did not need to do so, so long as they did not "question him any further on that particular matter."[19/] Sergeant Midkiff advised his staff of their obligation not to ask any questions of Petitioner during the trip, because Petitioner had requested an attorney.[20/] Detective Davis "deliberately avoided" asking questions because he felt a legal obligation not to do so.[21/]

Officer Midkiff did, however, make a phone call to Myrna Parker, the prosecuting attorney, and was instructed by Ms. Parker, in spite of James' unequivocal request for an attorney, to proceed with the planned trip.[22/]

As officers Midkiff and Davis and Petitioner were leaving on their journey, Midkiff asked James for a run-down on the directions: "where do we go, how do we get there, and from there on he said, I'll show you, just go out Grand Avenue and I'll show you; that's the way it started. Once we hit Grand Avenue, as I recall he told us where to go in plenty of time to determine there was no need to ask do I turn here."[23/]

18/ RT, August 27, 1982, pages 50-51 (Appendix "B").

19/ Id., Page 51, lines 11-19.

20/ RT, August 27, 1982, pages 57 (Appendix "B").

21/ RT, September 3, 1982, pages 15-16 (Appendix "C").

22/ RT, August 27, 1982, pages 55-56 (Appendix "B").

23/ RT, August 27, 1982, pages 59-60 (Appendix "B").

During a two-hour journey, James directed the officers to an abandoned mineshaft in a isolated desert area where many deserted mines were located.[24/] In that mineshaft, police uncovered the body of Juan Maya. It was not likely that the body would have been found among the rubble in the secluded mineshaft had James not led the officers to it.[25/]

By information filed on December 18, 1981, the Maricopa County Attorney charged Petitioner and one Lawrence Libberton with the first degree murder, aggravated robbery, kidnapping, and theft, all in connection with the death of Juan Maya. The trials of James and co-defendant Libberton were severed.

Petitioner James moved to suppress the inculpatory statements obtained by the police after James invoked his right to counsel as well as the fruits of the police-escorted journey.[26/] The testimony of officers Midkiff and Davis and that of two other officers who were at the scene and drove James back to Phoenix, was heard by the trial court on August 27, and September 3, 1983.[27/] By minute entry dated September 7, 1982, Judge Hughes denied Petitioner's Motion stating as follows:[28/]

> ORDERED defendant's motion to suppress is denied, the Court finding that the defendant knowingly, willingly and voluntarily made his statements; that there were no threats or promises or force used to induce the statements.

24/ RT, August 27, 1982, pages 53-55. (Appenidix "B"); RT, September 3, 1982, pages 14; 24-25. (Appendix "C")

25/ RT, August 27, 1982, page 54. (appendix "B").

26/ RT, August 27, 1982, page 6. (Appendix "B").

27/ See Reporter's Transcripts attached to this Petition as Appendices "B" and "C".

28/ Minute Entry of the Honorable Ed. W. Hughes, September 7, 1982.

At trial, the officers Midkiff and Davis testified that James led them to the site of the mineshaft and about what they saw at the sight. They and other officers testified regarding incriminating statements made by James before and during the trip to and from the site. Photographs of the site and the body were introduced. Dirt samples, blood stained rocks and railroad ties, a cigarette package and many other items gathered from the mineshaft and surrounding area were brought into evidence. There was considerable testimony regarding the condition of the body. The State's medical examiner testified that Juan Maya died from a head injury.

Libberton did not testify at James's trial. The apparent fellow-culprit with James and Libberton, and the only non-defendant eyewitness, was Martin Norton. Norton was a minor who, in exchange for the State's agreement not to prosecute him as an adult, agreed to testify for the State.[29/] Norton, however, admitted on the stand that he had lied to police and to the prosecuting attorney during the various interviews.[30/] Detective Davis testified that Norton had given him three substantially different stories when he interviewed him on November 19, 1981, the same day James was interviewed.[31/] On that day, shortly before James was interrogated, Norton's third story was that he did not participate in the murder and did not see Maya after Libberton and James took him away in Maya's car and then returned without him.[32/] By the time of trial, the discovery

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29/ RT, Volume V, September 27, 1982, pages 811-812, 854.

30/ RT, Volume V, September 27, 1983, pages 817-819, 840, 845-855.

31/ RT, Volume II, September 21, 9182, page 353

32/ RT, Volume II, September 21, 1982, pages 360-361.

of Maya's body and after Martin entered into the plea agreement, his story evolved into one of complete complicity. He testified at trial that he not only accompanied James and Libberton to the murder scene, but delivered the death blow by crushing the victim's skull.[33] Probably the most damaging testimony of Norton, incriminating Petitioner James, was that it was James' idea to kill Maya. But, by his own admission, one of Norton's chief motives in testifying against James aside from the compulsion of the plea agreement, was his own animousity towards James.[34/]

Other than Norton's testimony, the State's case was largely founded upon testimony of officers Midkiff and Davis and the evidence discovered as the direct and singular result of their interrogation of James and the ensuing trip to the mineshaft site.

James was found innocent on the charges of aggravated robbery and theft. He was convicted of the first-degree murder and kidnapping charges. On November 23, 1982, the trial court sentenced Petitioner Steven James to death.

The Petitioner then filed an appeal with the Arizona Supreme Court, contending, among other things, that the trial court's denial of the Motion to Suppress and the admission of testimony regarding Petitioner's statements and conduct while leading officers to the body and the tangible evidence obtained at the mineshaft site was reversable error.

33/ RT, Volume V, September 27, 1982, page 834.

34/ RT, Volume V, September 27, 1982.

Petitioner's contention before the Arizona Supreme Court was that his incriminating statements and testimonial conduct in accomodating the officers were the result of custodial interrogation after Petitioner had invoked his Fifth Amendment right to an attorney, in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Essentially, Petitioner's argument in this connection was three-fold:[35/]

1. Petitioner James twice unequivocally invoked his Fifth Amendment right to consult an attorney before further interrogation.

2. Subsequent police conduct, resulting in Petitioner's incriminating statements and testimonial cooperation was, if not express interrogation, the "functional equivalent" of interrogation within the meaning of Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

3. Given James' request for an attorney, Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), mandates that the fruits of the officers' interrogative words and actions must be suppressed.

The State argued in response:[36/]

1. The question of Sergeant Midkiff, "Is he going to take us to where the body is?", was intended for and directed to Detective Davis and not the accused. It was, therefore, not the "functional equivalent" of interrogation within the meaning of Innis, supra.

2. James' response to Sergeant Midkiffs' question was "spontaneous" and voluntary.

35/ Appellant's Opening Brief, State of Arizona v. Steven Craig James, Arizona Supreme Court No. 5744 (Appendix "D").

36/ Appellee's Answering Brief, State of Arizona v. Steven Craig James, Arizona Supreme Court No. 5744 (Appendix "E").

3. The Court need not reach the issue of waiver since the police did not question Petitioner about the crime after he invoked his right to counsel. The police merely allowed James to give them directions to reach the mineshaft.

On June 5, 1984, The Arizona Supreme Court issued its opinion affirming the trial court's denial of Petitioner James' Motion to Suppress.[37/] Relying on Edwards v. Arizona, supra, and Oregon v. Bradshaw, ___U.S.___, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the Court purportedly applied a "two-step analysis": 1) whether the evidence sought to be suppressed was the result of a discussion initiated by the accused; and 2) whether the accused had waived his right to counsel.[38/] In this regard, the Court began its analysis as follows:[39/]

> The Judge who presided over the voluntariness hearing said that James "knowingly, willingly, and voluntarily made" the statement and there were no threats, promises or force used to induce the statement. The Judge did not explicitly state that Midkiff's questions to Davis was not interrogation as defined in Rhode Island v. Innis, 446 U.S. 91, 100 S.Ct. 1684, 64 L.Ed. 2d 297 (1980), nor did he explicitly state in the order that James waived his right to counsel; however, we find that both are implicit in his findings based in the record.

The Court then proceeded to rule that James "initiated the communication" based upon the State's contention that Sergeant Midkiff's question was meant soley for Detective Davis. Presumably, the Court was of the opinion that if the question was not addressed to James, it was not interrogation and, therefore, James' response was the "initiation" of the communication which followed.

37/ Id., pages 18 and 22.

38/ State v. James, _____ Ariz. _____, P.2d ___ (1984) (Appendix "A").

39/ Id.

As to the issue of waiver the Court reasoned:40/

> The judge's ruling indicates that the police did not coerce James' statements, rather James, who knew his rights and how to exercise them, decided to cooperate. We hold that his statement was not obtained in violation of any of James' constitutional rights, as he initiated the communication and the judge implicitly found that James knowingly and intelligently waived his right to counsel.

With regard to the police-escorted trip to the mineshaft, the Court found:[41/]

> Following this statement, James and the officers drove to Salome, Arizona, which was a two-hour drive. James directed the officers to the site, but no other words were spoken during the trip to Salome. At the site, and during the return trip James made inculpatory statements. Some of the statements were made in response to questions; some were not. These statements were made, as the Judge below found, "knowingly, willingly and voluntarily" and after James decided to proceed without counsel.

Petitioner submits that the Arizona Supreme Court erred in the following respects:

1) In its finding that Petitioner "initiated communication" with the officers, within the meaning of Edwards, supra;

2) By adopting the trial court's finding that Petitioner's statements were "voluntary" as implying a finding of waiver, where the State had not sought to establish waiver and where there was no separate focus on whether James knowingly and intelligently waived his right to counsel;

40/ Id., page 6.

41/ Id.

3) In its apparent finding that Sergeant Midkiff's initial question was not the "functional equivalent" to interrogation, a finding which was necessarily based soley on the State's assertion that the question was not intended for Petitioner; and

4) In its reasoning that the police-escorted trip to the mineshaft was not a violation of Petitioner's rights simply because, although Petitioner gave directions, "no other words were spoken.".

REASON FOR GRANTING THE WRIT

THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS AND THE ARIZONA SUPREME COURT'S AFFIRMATION WHERE IN TOTAL NON-CONFORMITY WITH THE LETTER AND SPIRIT OF EDWARDS V. ARIZONA AS WELL AS CONTRARY TO THE RECORD BEFORE THOSE COURTS.

In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1800, 68 L.Ed.2d 378 (1981), this Court established a "bright-line rule" to safeguard a criminal suspect's Fifth and Fourteenth Amendment right to an attorney during custodial interrogation. Solem v. Stumes ___ U.S.___, 79 L.Ed.2d 579, 586, 104 S.Ct. ___ (1984). The accused's Fifth Amendment right to counsel was first ennunciated in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), where this Court stated, "[u]nless adequate devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U.S. at 458. Thus in Miranda, this Court held that "if the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474. The Miranda Court recognized, of course that the accused's rights could be waived. In this regard the Court stated:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escebedo v. Illinois, 378 U.S. 478, 490, note 14, 12 L.Ed.2d 977, 986, 84 S.Ct. 1758. This Court has always set high standards of proof for the waiver of constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019, 146 ALR 357 (1938), and we re-assert these standards as applied to in-custody interrogation.

Miranda, supra, 384 U.S. at 475.

In light of the precedent of Miranda, this court elaborated further in Edwards, supra, as follows:

> [A]lthough we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation [Citation], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiated further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-485 [emphasis added].

Edwards makes clear that, in the absence of "initation" by an accused, there can be no valid waiver regardless of whatever else the accused may say or do. Id.

In Oregon v. Bradshaw, ___ U.S.___, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), this Court explained Edwards as requiring separate inquiries as to "initiation" and "waiver"--a two-step approach. If it is found that the accused did not initiate the conversation out of which further interrogation and inculpatory statements arose, that ends the inquiry. In other words, before waiver can be established there must exist the "necessary fact that the accused, not the police, reopened the dialogue with the authorities.". Edwards, supra, 451 U.S. at 484; Bradshaw, supra, ___ U.S. at ___, 77 L.Ed.2d at 417.

Moreover, waiver may not be established by the mere fact that the accused cooperated with authorities and "voluntarily" gave them information. As explained in Edwards:

> First, the Arizona Supreme Court applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel. It is reasonably clear under our cases that waiver of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinguishment or abandonement of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." [Citations ommited].
>
> Considerating the proceedings in the State courts in light of this standard, we note that in denying Petitioner's Motion to Suppress, the trial court found the admission "voluntary"...without separately focusing on whether Edwards had knowingly and intelligently relinguished his right to counsel.

451 U.S. at 482-483.

In Edwards, this Court soundly rejected the Arizona Supreme Court's finding of waiver based on the trial court's finding of "voluntariness". Id.

It follows that as appellate finding of waiver is absolutely impossible where as in this case, the issue has not been contended or even addressed in the trial court proceedings and the issue was essentially conceded by the State in its brief on appeal.

The United States Supreme Court in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) defined "interrogation" as referring "not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id., 446 U.S. at 301. The concept of interrogation is not limited to express questions of the accused relative to his culpability, but entails the concept of its "functional equivalent", i.e.,

any words or actions on the part of the authorities which subjects the accused to "a measure of compulsion above and beyond that inherent in custody." Id., 446 U.S. at 300. In this regard, the Innis opinion states:

> The latter portion of this definition focused primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

Id., 446 U.S. at 301

Thus, the accused is not burdened with proving the authorities' interrogative intent in the face of the State's self-serving assertions of good faith. The inquiry is an objective one: 1) whether the authorities' words and actions were justifable in the context of procedures ordinarily attendant to arrest and custody; and 2) whether the authorities' words and actions might reasonably result in an inculpatory response under the circumstances. Id.

A. AFTER REQUESTING AN ATTORNEY, PETITIONER DID NOT "INITIATE" CONTACT OR CONVERSATION WITH POLICE OFFICERS WITHIN THE MEANING OF EDWARDS.

It is simply not a fact that Petitioner "initiated" conversation about the location of the body with Sergeant Midkiff. There was no significant change in circumstances between Detective Davis' interrogation and Sergeant Midkiff's appearance at the interrogation room door, no lapse in time, no change of place and, in fact, no true break in the interrogative atmosphere at all. Petitioner did not seek

contact with the Sergeant or ask to speak with him. It was Midkiff who suddenly appeared and who first brought up the subject of the body. He initiated the subject and interjected his own anticipation, even expectation, that Petitioner would show them where the body was.

There can be no dispute that Petitioner's inculpatory offer to accommdate Sergeant Midkiff was in direct response to the Sergeant's own expressed hope, and not the other way around. Thus, it cannot be said that the Petitioner himself "initiated further communication, exchanges, or conversations with the police." The Arizona Supreme Court's inquiry should have ended with that finding.

B. ASSUMING, ARGUENDO, THE FINDING OF "INITIATION" WAS PROPER, THE SUPREME COURT'S FINDING OF WAIVER WAS UNSUPPORTED BY THE RECORD AND LEGALLY ERRONEOUS

In this case, as in Edwards, supra, the trial court found Petitioner's statements to be "voluntary," without separately focusing on whether Petitioner had knowingly and intelligently relinquished his right to counsel. In this case, as in Edwards, the Arizona Supreme Court erroneously assumed that, in finding "voluntariness," the trial court necessarily implied the finding of a valid waiver.

As this Court emphasized in Edwards, however, "the voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries." Edwards, supra, 451 U.S. at 484.

Assuming, Arguendo, that the Arizona Supreme Court's finding of "initiation" on the part of Petitioner was proper, the burden remains upon the State to show that Petitioner made a "knowing and intelligent relinquishment" of his right to counsel. This is made clear in the following footnote to this Court's opinion in Edwards, supra:

> If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened dialogue with the authorities.

445 U.S. at 486, n.9 [emphasis added]

In Edwards, the accused's admissions were excluded even though he was again informed of his Miranda rights (as James was not), and even though he was "willing to talk" and told the officers, "I'll tell you anything you want to know." 451 U.S. at 479. Perhaps Petitioner's statements and cooperative conduct were "voluntary," in the sense that they were not coerced, but under Edwards, that is not enough.

In this case, the State has not considered waiver a serious issue. This is understandable, since officer Midkiff and Davis testified that they attempted to conduct themselves in a manner which they considered consistant with the continuing effect of Petitioner's request for counsel. The State simply contends that the issue of waiver need not be reached because the officers did not question Petitioner further about the crime itself. It is clear from the record, however, that they did question Petitioner about the location of the body.

Even if Petitioner's motion to suppress had indeed been seriously considered in light of the "totality of the circumstances," no valid waiver could have been found. The simple fact is, that Petitioner's two requests for counsel were ignored.

The first time Petitioner requested counsel, Detective Davis responded by attempting to minimize the importance of Petitioner's rights: "I told him that I was only trying to get the facts of the case and giving him an opportunity to tell his side of it too . . ." It is no wonder that Petitioner exhibited some confusion before reiterating his desire for legal assistance. Then, without time for reflection of any sort, Petitioner was confronted with the expectant and accusatory question from officer Midkiff: "Is he going to show us where the body is?"

After Petitioner "spontaneously" responded to Officer Midkiff, he was not reminded in any way that his right to counsel was a consideration. He was left alone in the interrogation room for an hour while the officers consulted the prosecuting attorney and prepared for the trip.

Under the circumstances, it cannot be said that Petitioner validly waived his request for counsel. It is obvious, on the other hand, that he had every reason to believe his supposed rights were meaningless.

C. PETITIONER'S STATEMENTS AND THE FRUITS OF THE POLICE-ESCORTED TRIP WERE THE PRODUCT OF IMPROPER CUSTODIAL INTERROGATION

Petitioner submits that his incriminating statements and the evidence obtained as a result of the police-escorted trip were the product of interrogation within the meaning of Rhode Island v. Innis, supra. Since the interrogation took place after his right to counsel had been invoked, the interrogation was improper. The integration of this improper interrogation and the resulting incriminatory evidence is such that there is not the slightest attenuation to "dissipate the taint." Wong Sun v. United States, 371 U.S. 471, 487, 83 S.Ct. 407 9 L.Ed.2d 441 (1963).

The State has and will argue that Sergeant Midkiff's question, "Is he going to show us where the body is?", was meant solely for Detective Davis and, therefore, Petitioner should not have responded. Yet, Sergeant Midkiff testified that, under the circumstances, it was not unreasonable for Petitioner to have assumed that the question was directed toward him. Indeed, the Sergeant's sole purpose for going to the interrogation room was to find out if Petitioner was going to accommodate the officers by directing them to the body. The information he sought could come from no one other than Petitioner.

The Arizona Supreme Court disposed of this issue by, again, implying its resolution by the trial court's finding that Petitioner's response was "voluntary." The only other factor the Court appeared to consider is that Midkiff's question was meant solely for Sergeant Davis. Under the analysis prescribed by Rhode Island v. Innis, supra, however, "interrogation" not only means express questioning, but non-routine "words or actions . . . that the police should know are reasonably likely to elicit an incriminating response . . . " 446 U.S. at 301 (Emphasis added).

In the instant case, unlike the situation in Innis, Sergeant Midkiff's question was accusatory, assumptive, and reasonably likely to elicit a response--it, in fact, veritably invited a response.

The State, of course, denies that the officers employed any scheme or ruse to bring about Petitioner's cooperation. The result, however, was so advantageous to the police in this case that the temptation to employ similar psychological ploys in the future is likely to be overwhelming.

Moreover, Officer Midkiff's conduct was clearly outside the perameters of routine police activity attendant to arrest and custody. It is further important to note the Petitioner's response was followed closely, not by a thorough reminder of the Petitioner's Fifth Amendment rights, but by the Sergeant's follow-up question, "Where is it [the body]?" The Sergeant seized the opportunity to exploit Petitioner's fortuitous response by express questioning, with the clear intention to elicit further incriminating information.

The events that followed effectively placed Petitioner in a continuing interrogative atmosphere. The actions of the officers were intended to keep Petitioner talking and out of contact with counsel. The trip to the mineshaft began with the question "Where do we go?" and, therefore, the officers felt justified by their silence, allowing Petitioner to take it from there. The trip itself was the "functional equivalent" to interrogation. Petitioner's statements along the way would not have been obtained had he not been the subject of an improper question which required a two-hour answer.

CONCLUSION

The ultimate effect of the Arizona Supreme Court's opinion in Petitioner's case is to negate the Constitutional safeguards mandated by this Court in Edwards v. Arizona. Petitioner respectfully submits that if Edwards is to have any meaning whatsoever, the Arizona Supreme Court's decision must be reversed.

RESPECTFULLY SUBMITTED this 3rd day of August, 1984.

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OPPOSITION BRIEF

ORIGINAL

NO. 84-5191

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

STEVEN CRAIG JAMES,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Fifth and Fourteenth Amendments require suppression of petitioner's post-arrest statements and the discovery of the victim's body in light of the fact that the Arizona Supreme Court correctly applied the proper constitutional standards in determining admissibility of those statements and made factual findings attending thereto that are fully supported by the state record?

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STATEMENT OF THE CASE

By information filed December 18, 1981, the Maricopa County Attorney charged Lawrence Libberton and petitioner with the first-degree murder of Juan Maya, aggravated robbery, kidnapping, and theft arising out of the same circumstances that led to the murder. Petitioner obtained a severance and proceeded to trial in September 1982.[1]

Maureen Flaherty, a teller at the Valley National Bank at 19th Avenue and Bethany Home Road, testified that on the morning of November 17, 1981, Lawrence Libberton presented Juan Maya's Mastercharge to obtain a cash advance. She had Libberton fill out a convenience check, and obtained a description of Maya from the Ajo Valley Bank. When the description of Maya did not match Libberton, she informed security, who called the police. When police arrived shortly thereafter and arrested Libberton, petitioner, Daniel McIntosh, and Martin Norton in the parking lot, she identified Libberton as the man who had presented Juan Maya's Mastercharge. (R.T. of Sept. 20, 1982, at 87-99.)

Detective Thomas Neus testified that Libberton told him that he was on work furlough and needed to leave Phoenix. That was why he was attempting to obtain a cash advance. He told Neus that Juan Maya had picked up a young boy and made homosexual advances toward him. This boy lured Maya to a trailer where some "friends" obtained Maya's identification, credit cards, and car. Libberton denied ever having seen Maya. Libberton was afraid to

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1. The Court will find a resume of the facts in the companion case, State v. Libberton, No. 5701 (Ariz.Sup.Ct., Apr. 23, 1984). Libberton also received the death penalty.

say more about the incident. (R.T. of Sept. 20, 1982, at 101-48.) Detective Owen testified that he and Detective Davis went to petitioner's trailer November 18, 1981. Daniel McIntosh was also present. The detectives asked both men whether they knew anything about Juan Maya and showed them a picture of him. McIntosh appeared nervous, but petitioner was calm. Detectives gave each suspect a business card and told them to call if they learned anything about the victim. (R.T. of Sept. 20, 1982, at 168-79.) McIntosh did later contact police and told them that he had heard petitioner and Libberton bragging about how they murdered Maya. (Id.)

Detective Russell Davis testified that Daniel McIntosh called him to report the murder. McIntosh told him that Maya had been beaten, shot, and thrown into a mine shaft. (R.T. of Sept. 21, 1982, at 227-307.) After an interview with petitioner, he accompanied him to the desert, where petitioner showed police the location of the body. (Id. at 233.) Davis stated that it took approximately 2 hours to reach the location from Phoenix; police found Juan Maya's body at the bottom of a 31-foot mine shaft. There were bloody rocks near the entrance of the mine shaft. (Id. at 234-35.) Davis testified that the chest area of the victim's shirt appeared to have been burned. (Id. at 293.)

Sergeant Michael Midkiff accompanied Davis when petitioner led police to the body in the mine shaft on his parents' property near Salome. (R.T. of Sept. 23, 1982, at 578.) Petitioner directed police to the mine, but they asked him no questions. (Id. at 605.)

Daniel McIntosh knew Libberton, Martin Norton, and petitioner. All four had been at petitioner's trailer

the evening of the murder. (R.T. of Sept. 22, 1982, at 452-55.) McIntosh left about midnight. The next day, Libberton and petitioner came to see him. Petitioner looked tired, as if he had been up all night. McIntosh observed a large gash on petitioner's knuckle. Norton was not with Libberton and petitioner at that time. (Id. at 464-65.) Libberton told McIntosh that he had a new car, for which he had paid $500.00. Later that day at petitioner's trailer, McIntosh saw that Norton and Libberton had changed clothes. He saw a red toolbox and a suitcase that he had not noticed in the trailer previously. (Id. at 466-71.) They visited various stores in the new car, and Libberton and Norton made some purchases. Libberton was wearing a belt with "Maya" on it. (Id. at 472-74.) Libberton asked McIntosh whether he wanted to go to Colorado in Libberton's new car. Later that day at the Valley National Bank at 19th Avenue and Bethany Home, police surrounded the car while Libberton was in the bank. Petitioner was behind the wheel and about to leave, but police prevented their departure. (Id. at 477-78.) When police questioned him on the bank's parking lot, McIntosh told them that Libberton's name was "John" because Libberton had told him to say that in case police ever asked. (Id. at 480-81.) McIntosh said that he told police at that time to keep everything that he told them confidential because he was afraid of what Libberton and petitioner had done. (Id.) At petitioner's trailer, after police had talked to all four, Norton took the red toolbox. (Id. at 482.) The day after the murder, and after police had talked with all four, petitioner told McIntosh that Marty Norton had come in with the victim and asked him and Libberton

to "waste him." (Id. at 482-84.) Petitioner told McIntosh that "they beat the hell out of him for a while." Norton accused the victim of sexual assault, and Libberton made him sign over his car title to him. McIntosh testified that petitioner laughed when he described how he gashed his knuckle while breaking Maya's nose. (Id. at 485.) Petitioner told him that he, Libberton, and Norton took the victim into the desert, and en route, a policeman stopped them. When they arrived at the mine on petitioner's parents' property, they beat and shot Maya, finally having to resort to clubs and rocks to kill him. They threw him into a mine shaft and covered his body with rocks and debris. (Id. at 485-86.) McIntosh stated that he had seen petitioner cleaning a .44 caliber cap and ball revolver in his trailer 3 days before the murder. (Id. at 488.) While petitioner was relating the events leading up to the murder and the murder itself, he never told McIntosh that Libberton or anyone else threatened him or coerced him to do anything. McIntosh stated that petitioner had a smile on his face as he narrated the events. (Id. at 489.) McIntosh was with petitioner when Detectives Davis and Owen came to petitioner's trailer the day after the murder. The detectives asked them if they knew Juan Maya or anything about him. They both denied any knowledge of Maya. The detectives gave them their business cards and asked them to call if they should learn something. After the detectives left, petitioner took McIntosh's card and tore it up. (Id. at 492-93.) He then gave McIntosh a suitcase of clothes and told him to dispose of them because he did not want police to find them. (Id.) Later, McIntosh called Detective Davis to report the murder. (Id. at 494.)

Approximately 6 weeks before petitioner's trial commenced, he called McIntosh and asked him not to testify. He also told him he would kill him if he ever had the chance. (Id. at 502-03.) Two weeks later, petitioner again called McIntosh, identified himself, and threatened to put a snitch jacket on McIntosh and to kill him if he caught him in jail. (Id. at 501.)

Detective Jack Hackworth testified that he took a statement from Martin Norton after giving him Miranda warnings. Norton told him that petitioner helped kill Maya; petitioner and Libberton hit Maya with big rocks. Norton also said that he gave the victim's credit cards to petitioner. (R.T. of Sept. 22, 1982, at 561-68.)

At the time of the murder, Martin Norton, who was then 14, had been living in petitioner's trailer about a week and a half. (R.T. of Sept. 27, 1982, at 747-48.) The night of November 16, 1981, he was hitchhiking back to the trailer when Juan Maya picked him up in his Thunderbird. After activating the electric door locks, Maya made homosexual advances. (Id. at 750-54.) Norton resisted and hit Maya. However, he told Maya that there was a homosexual at the trailer who could satisfy him. (Id. at 757.) Libberton and petitioner were in the trailer. As Maya followed Norton through the doorway of the trailer, Norton told Libberton and petitioner that Maya was gay and to get him away from Norton. Petitioner kicked Maya in the crotch, and Maya ran from the trailer. (Id. at 760.) Before chasing Maya, petitioner took a gun from beneath the chair and gave it to Norton. Then he and Libberton pursued Maya. While they were briefly absent, Norton returned to the victim's car to see if there was something he could steal. He took a red

toolbox. (Id. at 761-63.) When petitioner and Libberton returned with the victim, the victim's mouth and nose were bleeding profusely. (Id. at 764.) Inside the trailer, all three took turns beating Maya. (Id. at 765-66.) The victim told them to take his car, wallet, credit cards, but to leave him alone. (Id. at 768.) Petitioner asked for his wallet, and went through it. He removed the credit cards, money, and pictures. Libberton forced Maya to sign over the car registration to him. Libberton told Maya to empty his pockets and took Maya's belt. (Id. at 768-70.) Petitioner took a ring and bracelet from the victim. While the three considered what to do with the victim, petitioner said, "Well, we can kill him." (Id. at 773.) Norton rejected that idea, but Libberton said nothing. Petitioner repeated that the only thing to do was to kill Maya, and that he could hide the body on property in Salome. Libberton and Norton agreed. Petitioner took the gun and told the victim to go out to the car. Petitioner drove while Libberton held the revolver on the victim in the backseat. (Id. at 775-76.) At a service station on Grand Avenue, petitioner purchased gasoline with one of the victim's credit cards. Norton stated that, while the three were discussing what to do with the victim, the victim was conscious and overheard their entire discussion. While they were at the service station, Libberton told Maya not to try anything or he would shoot him. (Id. at 778.) En route to Salome, a policeman stopped the car. Petitioner got out and went to the rear of the car to talk to the policeman. The officer never approached the car. Back inside the car, petitioner said, "You can talk to those pigs and they'll do anything." (Id. at 779-80.) Before

they reached Salome, Norton told petitioner not to kill Maya. Petitioner replied, "We've come this far, we might as well kill him." Norton suggested simply breaking Maya's legs and throwing him into the shaft. (Id. at 781.) Once they arrived at the mine site, Libberton returned the revolver to petitioner. Petitioner told Maya to get out and start walking up the hill. Maya had already asked Norton to try to talk his friends out of murdering him. (Id. at 782-83.) Petitioner told Maya to move close to the mine shaft. He pointed the gun at him and pulled the trigger. Sparks flew, and something hit Maya's chest, but he charged petitioner and struggled for the gun. (Id. at 786.) While Maya and petitioner struggled for the gun, Libberton began to hit the victim with rocks, and Norton handed him a board that he used to hit Maya. After Libberton hit Maya with the board, Maya released his grip on the gun. (Id. at 787-88.) Petitioner again pointed the gun at the victim's head and pulled the trigger; this produced only more sparks. (Id.) The victim was breathing hard when petitioner handed the gun to Libberton and Libberton fired directly at Maya's head. (Id. at 789.) This seemed to produce no effect, so petitioner took the gun, aimed it at the victim's head and shot again. Petitioner noted that the victim was not dead because of the gurgling sound he was making. (Id. at 790.) Norton now hit the victim in the head once with a rock while Libberton and petitioner each hit him twice in the head with large rocks. (Id. at 790-91.) At last satisfied that the victim was dead, petitioner instructed Libberton to help him drag the body to the mine shaft. They threw the victim's body in and covered it with debris and railroad ties. (Id. at 792.)

On the way back to Phoenix, petitioner threatened Norton not to reveal the murder, telling him that he would wind up the same way. (Id. at 794, 805.)

Back at the trailer that same morning, petitioner told Norton to clean the trailer. Petitioner and Libberton returned to the trailer later that morning with Daniel McIntosh. (Id. at 796.) Libberton already had Maya's belt and said that he might as well be Maya. (Id. at 797.) Norton was with McIntosh, Libberton, and petitioner when police arrested them on the parking lot of the Valley National Bank that same day. Norton admitted having lied to police about some details in previous statements.

Dr. Thomas Jarvis, the medical examiner, testified that Juan Maya died from a head injury. He stated that there was a 3 X 2 inch section of scalp missing above his left ear, revealing a comminuted skull fracture. Maya also had bruises over his left cheek and left ear, and abrasions on his back and chest. The front of his shirt displayed a 3-inch defect that appeared to have been caused by charring or burning. (R.T. of Sept. 27, 1982, at 860-68.)

The jury convicted petitioner of first-degree murder and kidnapping. After an aggravation-mitigation hearing, the trial court found two aggravating circumstances, no mitigation, and imposed the death sentence. On appeal, the Arizona Supreme Court affirmed the convictions and one aggravating circumstance; since there was no mitigation, that court also affirmed the death sentence. State v. James, No. 5744 (Ariz.Sup.Ct., June 5, 1984). Petitioner did not move for rehearing, choosing to file this petition for certiorari.

REASON FOR DENYING THE WRIT

THE ARIZONA SUPREME COURT CORRECTLY APPLIED THE PROPER CONSTITUTIONAL STANDARD FOR DETERMINING THAT PETITIONER INITIATED FURTHER COMMUNICATION WITH THE POLICE AND THAT COURT SEPARATELY FOCUSED UPON WHETHER, UNDER THE TOTALITY OF THE CIRCUMSTANCES, PETITIONER ALSO KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL AFTER INITIATING THAT COMMUNICATION.

Although for the most part respondent takes no issue with petitioner's exposition of the applicable cases in this area and their holdings, respondent does take issue with petitioner's mischaracterization, at least by omission, about what the Arizona Supreme Court says in its opinion. Basically, petitioner's thrust is that the Arizona Supreme Court still does not understand what this Court said in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1800, 68 L.Ed.2d 378 (1981). Petitioner attempts to strengthen this allegation by further implying that the Arizona Supreme Court also does not comprehend this Court's recent holding in Oregon v. Bradshaw, ___U.S.___, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). Examination of the Arizona Supreme Court's opinion, however, shows that that court has not forgotten this Court's stern admonition in Edwards, supra, that courts must focus separately upon the issue of voluntariness as distinguished from knowing and intelligent waiver of counsel. This Court has most recently refined Edwards by the holding in Oregon v. Bradshaw, supra. The opinion of the Arizona Supreme Court shows that it was keenly aware of both decisions, and correctly applied the holdings of both cases to the facts of this case. This Court in Edwards determined that the Arizona Supreme Court had erroneously applied the standard for determining waiver of counsel where the accused had invoked his right to counsel. This Court pointed out --

that voluntariness is one question, but that a separate question is whether the defendant made a knowing and intelligent waiver of counsel. In concluding that both the trial court and the Arizona Supreme Court had failed to properly apply this dual standard, this Court said:

> Considering the proceedings in the state courts in the light of this standard, we note that in denying petitioner's motion to suppress, the trial court found the admission to have been "voluntary," App. 3, 95, without separately focusing on whether Edwards had knowingly and intelligently relinquished his right to counsel.
>
> . . . .
>
> Here, however sound the conclusion of the state courts as to the voluntariness of Edwards' admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.

Edwards v. Arizona, supra, at 483-84, 101 S.Ct. at 1884. This Court then went on to hold that an accused who has invoked his right to counsel may not be subjected to further interrogation until counsel has been made available to him unless the accused himself initiates further communication or exchanges with the police. (Id. at 484-85, 101 S.Ct. at 1885.) The opinion also made clear that if the accused initiated further communication with the police and the police subsequently did something that amounted to interrogation, a state court would have to make a separate inquiry as to whether the accused had validly waived the right to counsel and his right to silence, but that inquiry would be based upon the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the

authorities. (Id. at 486, n.9, 101 S.Ct. 1885, n.9.) Justice Rehnquist cited that particular footnote from Edwards in this Court's subsequent opinion in Oregon v. Bradshaw, supra. The plurality opinion in that case made it clear that after a defendant has invoked his right to counsel, there must be a two-step analysis: (1) did the defendant initiate further communication with the police?; (2) if he did, did he also knowingly and intelligently waive the right to counsel? When one carefully examines the entire line of reasoning in the Arizona Supreme Court's opinion, it is evident that that court correctly applied the tests of Edwards and Bradshaw.

It is uncontested that police had given petitioner his Miranda warnings. It is further uncontested that twice during a 19-minute interview with Detective Davis, petitioner invoked his right to counsel. Thus, he obviously was aware of the right, otherwise he would not have invoked it. When he invoked it the second time, Detective Davis rose from the table and went to the closed door of the interrogation room. Opening that door, Davis found himself face-to-face with Detective Midkiff. The testimony of both Davis and Midkiff at the suppression hearing -- and petitioner did not testify at that hearing -- unequivocally indicates that Midkiff looked directly at Davis, not petitioner, and asked, in the third person singular, "Is he going to show us where the body is?" Obviously Midkiff was not addressing petitioner because if he had been, he would simply have used the pronoun "you." Since petitioner heard the question from Midkiff to Davis, petitioner was free to respond even though the question was not directed to him. He spontaneously answered that he would show police the location of the body. Detective

Davis further testified at the motion to suppress that either as petitioner answered or immediately after petitioner answered, Davis informed Midkiff that James had invoked his right to counsel. Thus, again the fact that James had the right to counsel was brought to his attention by police. Approximately an hour intervened while police made preparations for the 2-hour drive to Salome, Arizona, to the property where James and his cohorts had left the body. James gave police directions to that property and made a few incriminating statements at the site. Petitioner has presented all of this same material in his statement of the case. What he has not done, however, is to cite to the Court those portions of the Arizona Supreme Court's opinion that show a logical progression through the various stages mandated by Edwards and Bradshaw to determine whether the defendant initiated further discussion with the police and whether he knowingly and intelligently waived the right to counsel. The Arizona Supreme Court first noted that petitioner received Miranda warnings. State v. James, No. 5744, slip op. at 3 (Ariz.Sup.Ct., June 5, 1984). Realizing that Edwards demands that all further interrogation cease unless counsel has been provided or the accused initiates further communication, the Arizona Supreme Court then turned to a consideration of compliance with Edwards. That court also thoroughly analysed both the majority and dissenting opinions in Oregon v. Bradshaw. (Id. at 3-5.) The Arizona Supreme Court correctly interpreted the refinement of Edwards made by this Court in Bradshaw by focusing upon: (1) whether the accused initiated further discussion; (2) whether the accused waived his right to counsel. The Arizona Supreme Court correctly noted that the correct test

for waiver was that alluded to in the Bradshaw opinion. (Id. at 4.) Applying the proper criteria, the Arizona Supreme Court concluded that the trial court had implicitly found both tests of Bradshaw satisfied. (Id. at 5-6.) It noted particularly James' awareness of his right to counsel because James twice invoked his right to counsel. The Arizona Supreme Court candidly conceded that the trial court did not employ the proper "buzz words" to satisfy the specific language of Bradshaw. But, that court further noted that Bradshaw was handed down after the trial court had made its determinations in this case. (Id. at 6-7.) The Arizona Supreme Court noted that the trial court ruled that James "knowingly, willingly, and voluntarily made" the statement to police and that there were no threats, promises or force used to induce the statement. (Id. at 5.) Although the trial court did not explicitly state that Midkiff's question to Davis was not interrogation as defined in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Arizona Supreme Court found that the trial court did implicitly find that the question was not interrogation and that James initiated further communication with the police and waived his right to counsel. Most importantly, the Arizona Supreme Court independently focused upon the separate tests and found them to be satisfied from the trial court's findings based on the record. (Id. at 6.) Therefore, we do not have here the defect that was present in Edwards. This Court reversed the Arizona Supreme Court in Edwards because neither the trial court nor the Arizona Supreme Court separately focused upon a knowing and intelligent waiver of counsel as opposed to voluntariness. It is quite clear from the Arizona Supreme Court's opinion in this case that

it did separately focus upon a two-part test and that it found that the record satisfied both parts of the test. The Arizona Supreme Court then stated the following: "We hold that his statement was not obtained in violation of any of James' constitutional rights, as he initiated the communication and the judge implicitly found that James knowingly and intelligently waived his right to counsel." Having independently made that determination after focusing on the separate issues of voluntariness and knowing and intelligent waiver of counsel, the Arizona Supreme Court affirmed the trial court's denial of the motion to suppress both James' statements and the body. It cannot be said here, as this Court said in Edwards, that the Arizona Supreme Court did not search the record and independently satisfy itself that the two-part test of Bradshaw was met. Finally, the Arizona Supreme Court admonished trial judges in the future to state explicitly on the record their findings of fact and conclusions of law. That does not alter the fact that the Arizona Supreme Court, reviewing the entire record as it had to for fundamental error, applied the proper constitutional standards to the evidence from the record below.

A. Both the trial court and the Arizona Supreme Court made a factual determination that petitioner did initiate communication with the police within the meaning of Edwards.

It is in the subdivisions of these arguments that petitioner's tact is most plain. He gives it away completely by stating in the first line of this argument "It is simply not a fact that petitioner initiated conversation about the location of the body to Sergeant Midkiff." (Petition, at 19.) What petitioner wants this Court to do is to find its own facts in total disregard of the state court finding of facts. That, however, is not

the business of this Court. If this were a federal habeas corpus proceeding, this Court would not hesitate to hold that the state court's finding of facts are entitled to a presumption of correctness. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); 28 U.S.C. § 2254(d). This Court stated at the end of the Bradshaw opinion:

> We have no reason to dispute these conclusions, based as they are upon the trial court's firsthand observation of the witnesses to the events involved.

Oregon v. Bradshaw, supra, 103 S.Ct. at 2835. If petitioner cannot overcome this factual conclusion by the Arizona Supreme Court, he loses this point and his subsequent point. If he prevails at this point, he prevails on all points. Petitioner correctly cites from Rhode Island v. Innis, supra. However, he abbreviates his citation just before the portion that is most pertinent to his case:

> But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. at 302, 100 S.Ct. at 1690 (emphasis in original; footnote omitted). Petitioner, without benefit of any support in the record, attempts to portray Detective Midkiff as a nefarious policeman plotting to overwhelm his will. Petitioner notes that Midkiff "initiated the subject and interjected his own anticipation, even expectation, that petitioner would show them where the body was." (Petition, at 20.) Of course, there is absolutely nothing in the record to show that Midkiff anticipated or expected that James would show police anything and that is the reason petitioner does not

cite to the record. The testimony at the suppression hearing does show that Midkiff had no idea what Davis had asked petitioner during the interview or that petitioner had invoked his right to counsel. (R.T. of Aug. 27, 1982, Appendix B to Petition, at 41-45.) Since Detective Midkiff had not even met petitioner, did not know what, if anything, petitioner would say to Detective Davis in the interrogation room, and had absolutely no reason to think that petitioner had such a weak personality that he would totally collapse upon hearing one question directed to another police officer, petitioner does not begin to meet the test of showing that Midkiff should have known that this one question to Detective Davis was reasonably likely to elicit an incriminating response. It should be remembered that petitioner had just spoken with Detective Davis for 19 minutes and twice invoked his right to counsel, thereby showing he knew how to and chose to invoke it. Although Midkiff did not know that when Davis opened the door to the interrogation room, it certainly does not strengthen petitioner's petition to argue that he totally collapsed in the presence of one question directed to a police officer. In addition, either simultaneous with petitioner's offer to show police the location of the body, or immediately after that statement, Detective Davis told Midkiff that petitioner had invoked his right to counsel. Therefore petitioner heard, in essence, Miranda warnings repeated. (R.T. of Aug. 27, 1982, Appendix B to Petition, at 41, 49.) Here, as in Innis, supra, there was no direct interrogation of petitioner by either detective that was responsible for the incriminating statement. Neither was there the functional equivalent of interrogation. There was nothing to indicate that petitioner was disoriented,

sleepy, unaware of his constitutional rights, or in any manner peculiarly susceptible to an isolated question from one police officer to another officer. There is no basis for disturbing this factual conclusion of the state court and petitioner cites none in the record.

B. The record supports the Arizona Supreme Court's conclusion that James knowingly and intelligently waived the right to counsel.

Bradshaw makes it clear that if the accused initiated further communication with police, then the test to be applied to determine whether he also knowingly and voluntarily waived counsel is that of the totality of the circumstances. Obviously when an accused, as petitioner did here, tells the police he will show them the location of a body, the police are logically going to ask him about that location. The fact that Detectives Davis and Midkiff were circumspect and did not further question petitioner about the circumstances of the crime, only allowing him to direct them as they drove out to Salome, does not mean that they did not believe he had waived his right to counsel. In any case, that was a determination for the judicial branch of government, not the executive. This Court said in Edwards, and reiterated in Bradshaw, that the fact that the accused initiates further communication with police is one factor to be considered in determining whether he validly waived counsel. Since petitioner told police he would show them where the body was, it is illogical to assume that police were not going to ask directions to get to the body. It is also perfectly absurd to assume that petitioner was never going to utter another word. If he did that, how could he direct police to the body? Petitioner continues harping upon the point that police did not repeatedly at regular intervals remind him of his

Miranda rights. Why should they have since he had been reminded of them on several occasions and invoked them twice immediately before making the statement? Invocation of that right immediately before making the incriminating statement is persuasive argument that he was at the moment he made the statement aware that he did not have to speak to police. To argue that police then had to keep telling him about his Miranda rights is not convincing. See Wyrick v. Fields, 459 U.S.___, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982). Under the totality of the circumstances, the proper test, petitioner did knowingly and intelligently waive his right to counsel.

C. Since petitioner's statements and the discovery of the body were properly admitted, he cannot prevail in this argument.

If petitioner is incorrect in Arguments A and B, then he cannot prevail in this argument. Petitioner here merely rehashes previous allegations with no basis in the record that the police intended to elicit an incriminating response. Respondent has already answered those assertions.

Petitioner is incorrect when he alleges at page 23 of the petition that the information police were after, the location of the body, could come from no one other than petitioner. The hearing on the motion to suppress contains testimony to the effect that police had also spoken with Martin Norton, an eyewitness who testified at James' trial, and that he had told them that the body was located in a mine shaft on the property of James' parents in Salome. Detectives had also spoken with James' parents about that property. (R.T. of Aug. 27, 1982, Appendix B to Petition, at 64-67.) Whether or not petitioner had led police to the body, they would have located it. Nix v. Williams, ___ U.S.____, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

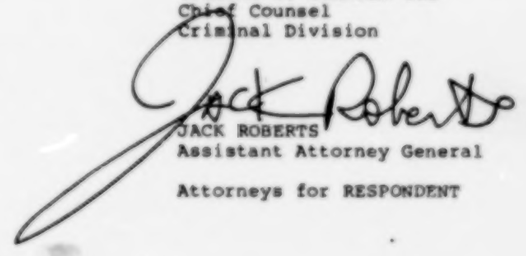
CONCLUSION

Analysis of the Arizona Supreme Court's opinion demonstrates that that court was keenly aware of this Court's holdings in Edwards and Bradshaw, and scrupulously applied those holdings while focusing separately on the question of voluntariness and the issue of knowing and intelligent waiver of counsel. That petitioner disagrees with the factual conclusions of the Arizona Supreme Court does not show that that Court incorrectly applied the constitutional standards. Petitioner's disagreement obviously lies in the area of an alleged design or motive on the part of police officers to make him incriminate himself. There is, however, no support for that in the record. The Arizona Supreme Court has applied the proper constitutional standards and correctly interpreted the applicable cases; there is no reason in the record for upsetting its factual determinations. The Court should deny the writ.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division



JACK ROBERTS
Assistant Attorney General

Attorneys for RESPONDENT

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he served the attorney for the petitioner in the foregoing case by forwarding two (1) copy of RESPONDENT'S RESPOMSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

PAUL F. LAZARUS
3300 North Central Avenue
Suite 1800
Phoenix, Arizona 85012
Attorney for APPELLANT

this 30th day of August, 1984.

Jack Roberts
JACK ROBERTS

SUBSCRIBED AND SWORN to before me this 30th day of August, 1984.

Barbara J. Orabuena
BARBARA J. ORABUENA
NOTARY PUBLIC

My Commission Expires:
September 28, 1986

CR36-55 bjo 4948D

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1984

No._____

STEVEN CRAIG JAMES,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

28.2

AFFIDAVIT OF FILING

JOSEPH M. ROMLEY, being first duly sworn, upon his oath deposes and says:

That in accordance with Rule 28.2, Supreme Court Rules, he forwarded the following documents for filing to the Clerk, Supreme Court of the United States, Washington, D.C. 20543 by depositing them in a United States Post Office, with first class postage prepaid, on this 3rd day of August, 1984:

1. Motion for Leave to Proceed in Forma Pauperis;
2. Petition for Writ of Certiorari to the Supreme Court of the State of Arizona;
3. Certificate of Service;
4. Appearance and Notification Form.

Joseph M. Romley
JOSEPH M. ROMLEY
ROBBINS & GREEN, P.A.
1800 United Bank Bldg.
3300 N. Central Ave.
Phoenix, Arizona 85012

STATE OF ARIZONA)
) ss.
County of Maricopa)

SUBSCRIBED AND SWORN to before me this 3rd day of August, 1984.

Connie S Brannigan
Notary Public

My Commission Expires:
12-16-84

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1984

No. 84-5191

ORIGINAL

STEVEN CRAIG JAMES,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

The Clerk will enter my appearance as Counsel for the Petitioner.

Signature: Paul F. Lazarus

Type or Print Name: Paul F. Lazarus

Address: 3300 N. Central Ave., Suite 1800

City and State: Phoenix, Arizona 85012

The Clerk is requested to notify counsel of action of the Court by means of:

[ ] Collect Telegram
[ ] Airmail Letter
[x] Regular Mail

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a particular individual to whom notification is to be sent, with the understanding that if other counsel should be informed he will perform that function.

In this case the person to be notified for is

[x] Petitioner(s)
[ ] Respondent(s)

Paul F. Lazarus
(Name)

3300 N. Central Ave., Suite 1800
(Street Address)

Phoenix, Arizona 85012
(City, State and Zip Code)

43 - letter 8/8/84

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1984

No. 84-5191

STEVEN CRAIG JAMES,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

AFFIDAVIT OF FILING

PAUL F. LAZARUS, being first duly sworn, upon his oath deposes and says:

That in accordance with Rule 28.2, Supreme Court Rules, he forwarded the following documents for filing to the Clerk, Supreme Court of the United States, Washington, D.C. 20543 by depositing them in a United States Post Office, with first class postage prepaid, on this 3rd day of August, 1984:

13

1. Motion for Leave to Proceed in Forma Pauperis;
2. Petition for Writ of Certiorari to the Supreme Court of the State of Arizona;
3. Certificate of Service;
4. Appearance and Notification Form.

Paul F. Lazarus
ROBBINS & GREEN, P.A.
1800 United Bank Bldg.
3300 N. Central Ave.
Phoenix, Arizona 85012

STATE OF ARIZONA)
) ss.
County of Maricopa)

SUBSCRIBED AND SWORN to before me this 3rd day of August, 1984.

Connie S. Brannigan
Notary Public

My Commission Expires:
12-16-84

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1984

No. 84-5111

STEVEN CRAIG JAMES,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that one (1) copy of the Motion for Leave to Proceed in Forma Pauperis, the Petition for Writ of Certiorari to the Supreme Court of the State of Arizona, and the Certificate of Service were served on each of the following persons by depositing the copies in a United States Post Office, with first class postage prepaid, on this 3rd day of August, 1984:

1. ROBERT G. CORBIN
   Attorney General for the State of Arizona
   1275 W. Washington
   Criminal Division - 2nd Floor
   Phoenix, Arizona 85007

I further certify that all parties required to be served have been served.

Paul F. Lazarus
ROBBINS & GREEN, P.A.
1800 United Bank Bldg.
3300 N. Central Ave.
Phoenix, Arizona 85012
Attorney for Petitioner

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1984

STEVEN CRAIG JAMES,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, STEVEN CRIAG JAMES, pursuant to Rule 46, Supreme Court Rules, asks leave to file the attached petition for a writ of certiorari to the Supreme Court of the State of Arizona without pre-payment of costs and to proceed in forma pauperis. The Petitioner was represented by the law firm of ROBBINS & GREEN, P.A., of which the undersigned is a member, on appeal to the Supreme Court of the State of Arizona. This representation was under a court appointment and Mr. James proceeded as an indigent in the State of Arizona before the Supreme Court of Arizona.

RESPECTFULLY SUBMITTED this 3rd day of August, 1984.

Paul F. Lazarus
ROBBINS & GREEN, P.A.
1800 United Bank Bldg.
3300 N. Central Ave.
Phoenix, Arizona 85012

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, STEVEN CRAIG JAMES, being first duly sworn, upon my oath, depose and state that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear:

1. That I am not currently employed, nor have I been employed since I was incarcerated by the State of Arizona as a prisoner at the Arizona State Prison, death row.

2. That within the last twelve months I have not received any income from any business, profession or self-employment, nor do I receive any interest, dividends, or other source of income.

3. That I have no checking nor savings account and the only cash with which I am possessed is that which is within my prison account, which is of a minimal amount.

4. That I do not own any real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

5. That I have no one who is dependent upon me for support.

I understand that a false statement or answer to any of the questions in this affidavit will subject me to penalties for perjury.

Steven Craig James
STEVEN CRAIG JAMES

SUBSCRIBED AND SWORN to before me this 1st day of August, 1984.

Connie S Brannigan
Notary Public

My commission expires:
12-16-84

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, PAUL F. LAZARUS, having first been duly sworn, state under oath that I am appointed counsel for the Petitioner in this case; that in support of this motion to proceed without being required to pre-pay fees, costs, or to give security therefor, I state that Petitioner was allowed to proceed in forma pauperis in the Supreme Court of the State of Arizona. The Petitioner is currently unemployed and has been incarcerated by the State of Arizona since 1983 on death row in the Arizona State Prison at Florence, Arizona.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Paul F. Lazarus
PAUL F. LAZARUS

SUBSCRIBED AND SWORN to before me this 3rd day of August, 1984.

Connie S Brannigan
Notary Public

My commission expires:
12-16-84

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1984

No. 84-5171

STEVEN CRAIG JAMES,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

MOTION FOR APPOINTMENT OF COUNSEL

Petitioner, STEVEN CRAIG JAMES, who has filed the attached Petition for Writ of Certiorari to the Supreme Court of the State of Arizona and the attached Motion for Leave to Proceed in Forma Pauperis, moves this Court to enter an order appointing the undersigned counsel to represent Petitioner in all further proceedings in this matter. Rule 46.6, Rules of the Supreme Court, 28, U.S.C. Undersigned counsel has represented the Petitioner in the Supreme Court of the State of Arizona in the litigation which has given rise to the accompanying Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 3rd day of August, 1984.

Paul F. Lazarus
ROBBINS & GREEN, P.A.
1800 United Bank Bldg.
3300 N. Central Ave.
Phoenix, Arizona 85012

REPLY BRIEF

DISTRIBUTED

SEP 21 1984

ORIGINAL

No. 84-5191

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1984

STEVEN CRAIG JAMES

Petitioner,

vs.

STATE OF ARIZONA,

Respondent

REPLY ON PETITION FOR WRIT
OF CERTIORARI

PAUL F. LAZARUS
ROBBINS & GREEN, P.A.
1800 United Bank
3300 N. Central Ave.
Phoenix, Arizona 85012
Telephone: (602) 248-7999

Attorney for Petitioner

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LEGAL ARGRUMENT IN REPLY

In its Response, the State takes issue with, what it terms, Petitioner's "mischaracterization" of the opinion of the Arizona Supreme Court in the instant case. As previously conceded in the Petition, the Arizona Supreme Court purportedly relied on Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) in arriving at its decision. The State contends that the Arizona Supreme Court's recitation on Edwards distinguishes that Court's opinion in this case from its erroneous decision in Edwards. Petitioner submits that this is a distinction without a difference. This Petitioner's plight is qualitatively no different than that of the accused in Edwards. Here, as in Edwards, the trial court failed to make any factual determination of "initiation" of communication by the accused, in this case, as in Edwards, the trial court failed to make any factual determination as to waiver of right to counsel.

The State further seeks to distinguish the instant case by arguing that the Arizona Supreme Court independently reviewed the record "as it had to for a fundamental error." (Response, at 14). Petitioner submits that had the Arizona Supreme Court made a thorough independent review of the record and applied the principals of Edwards to the facts therein, a finding of fundamental error should have been the result.

A. PETITIONER DID NOT "INITIATE" CONTACT OR CONVERSATION WITH POLICE WITHIN THE MEANING OF EDWARDS

In its response, the State confused the issue whether police words and conduct constituted interrogation with the question whether the accused, rather than the police, initiated the contact and dialogue which resulted in improper interrogation. These are

separate subjects of inquiry. See, Edwards v. Arizona, 451 U.S. at 486, 101 S.Ct. at _____, 68 L.Ed.2d at 387, and n.9.

It is Petitioner's simple contention that his contact and "dialogue" with authorities occurred solely at the instance of Officers Davis and Midkiff. Specifically, Petitioner's statements regarding the body and his cooperation in locating it was precipiated by Officer Midkiff's own desire to move his investigation forward. The interrogation room door opened and Midkiff asked the question, "Is he going to show us where the body is?" At the hearing before the trial court, Officer Midkiff testified that his "sole purpose" for going to the interrogation room "was to find out if he was going to show us where the body is." RT, August 27, 1982, at p. 45 (Appendix "B" to the Petition).

This Court has intimated that the term "initiate" should be defined in its "ordinary dictionary sense." Oregon v. Bradshaw, _U.S._____, 103 S.Ct. 2830, 77 L.Ed.2d 405, 412 (1983). According to Webster's New Collegiate Dictionary, 1981, to "initiate" means, "to cause or facilitate the beginning of: set going." Funk & Wagnall's Standard College Dictionary, 1973, gives a similar definition of the word "initiate": "To begin; commence; originate."

In no sense of the word, can it be said that Petitioner "initiated" conversation with Officer Midkiff. Even so, there still remains the issue of waiver, which the State bore a "heavy burden" to prove.

B. THE SUPREME COURT'S FINDING OF WAIVER IS UNSUPPORTED BY THE RECORD

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), this Court explained as follows:

> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in Carnley v. Cochran, 369 U.S. 506, 516, 8 L.Ed.2d 70, 77, 82 S.Ct. 884 (1962) is applicable here:
>
> "Presuming waiver from a silent record is impermissible, the record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver."

384 U.S. at 4756 [Emphasis added].

In the instant case, the State failed to allege, present evidence, or even argue waiver before the trial court. During the hearing on August 27, 1982, the following exchange between the prosecutor and Officer Midkiff occurred on redirect examination:

> Q. Now, you were also asked whether or not you were in contact with me and if I advised you as to anything. Were you advised not to interrogate the defendant any further whatsoever?
>
> A. I was, yes.
>
> Q. Did you interrogate the defendant any further?
>
> A. No, I did not.
>
> Q. And, you advised the rest of your staff not to interrogate the defendant any further?
>
> A. I did.
>
> Q. And, is it your understanding that when a defendant asked for an attorney, that all questioning must stop, correct?

> A. I do understand that, yes.
>
> Q. And it's your understanding that's your only obligation?
>
> A. As far as -- yes.

RT, August 27, 1982, at p. 57 (Appendix "B" to the Petition).

The hearing continued on September 3, 1982, and the following testimony of Officer Davis was elicited by the prosecutor:

> Q. Was there anything about the conversation that you were trying to get Steven James to give you an incriminating statement?
>
> A. I deliberately avoided trying to get into anything like that.
>
> Q. And that's because he requested an attorney?
>
> A. That's right.
>
> Q. Detective Davis, when someone requests an attorney, what do you feel your legal obligation is?
>
> * * *
>
> A. At that time I feel that he has the right to an attorney without any further questioning.

RT, September 3, 1982, at pp. 15-16 (Appendix "C" to the Petition)

Defense counsel cross-examined Officer Davis on the issue of waiver:

> Q. Did you ever make an inquiry as to whether Steven James, after having requested counsel, was making a knowing and intelligent, voluntary waiver, did you ever make that kind of inquiry?
>
> A. No.
>
> Q. Did anyone else?
>
> A. No.

Id. at pp. 20-21

On redirect, the prosecution rejoined with the following:

> Q. And, Detective, after the defendant asked for an attorney, there were no more questions asked of him, is that correct?
>
> A. That's correct.

Id. at p. 26.

During final argument, the prosecution summed up its position, in pertinent part, as follows:

> MS. PARKER: Your Honor, in this particular matter the State concedes that the defendant asked for an attorney. The entire question is, whether or not his request for an attorney was violated.
>
> The issue hinges upon whether or not there was any further interrogation. The burden upon the police officer, when there has been a request for an attorney, is to no longer interrogate the defendant. Any voluntary statements or spontaneous statements that a defendant would make after the request for an attorney is not included as interrogation.

I.d at pp. 26-27.

The defense then responded by vigorously arguing that there indeed was interrogation, that voluntariness was not the issue, that the good intentions of the police were irrelevant, and that the State had failed to establish waiver as required by Edwards v. Arizona, supra. RT, September 3, 1982, at pp. 29-31. The prosecution replied as follows:

> MS. PARKER: Your Honor, the State's very brief reply would be that there was no interrogation. After the defendant requested an attorney, the officer stood up, he started to leave. There was no preconceived plan, there was nothing in Detective Medcalf's (sic) mind when he walked up to say to Detective Davis and ask Detective Davis a question about the body, the question was not even directed to Steven James, he overheard it and he volunteered the information, therefore it is not a violation of any right that the defendant had.

Id. at p. 31

It is abundantly clear from the record that no finding of waiver could be "implied" from the trial court's finding of "voluntariness," or from independent review of the record. Until now, the State, for obvious reasons, has sought to wholly circumvent the waiver issue by arguing "no interrogation."

In its opinion, however, the Arizona Supreme Court found: "Some of the [Petitioner's] statements were made in response to questions, some were not. These statements were made, as the judge below found, 'knowingly, willingly and voluntarily' and after James decided to proceed without counsel." Slip Opinion, at p. 6.

It was never alleged or argued before the trial court that Petitioner had "decided to proceed without counsel." Even so, under Edwards, that is not the standard by which waiver is to be determined. The State now concedes that Petitioner was expressly questioned. It seeks to justify that questioning as the "logical" aftermath of Petitioner's response to Officer Midkiff.

The State argues that the Petitioner had been reminded of his Miranda rights on "several occasions." That argument is not supported by the record. The State argues that the Petitioner was reminded of his rights when Officer Davis told Officer Midkiff that the Petitioner had requested counsel. The Arizona Supreme Court, however, found that that "reminder" was "simultaneous" with Petitioner's own statement. Slip Opinion, at p. 3. In any event, it has been the state's contention that an accused should not respond to police statements not directed or meant for him.

The State's final contention is: "Invocation of [Petitioner's] right immediately before making the incriminating statement is persuasive argument that he was, at the moment he made the statement, aware that he did not have to speak to police." However, as so aptly stated by this Court in Miranda, supra, the mere fact that the accused makes a statement "with

'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights." 384 U.S. at 492.

C. POLICE WORDS AND CONDUCT CONSTITUTED IMPROPER INTERROGATION WITHIN THE MEANING OF RHODE ISLAND V. INNIS; RESULTING EVIDENCE SHOULD BE SUPPRESSED

The State apparently assumes that the factual circumstances in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) are analogous to those in the instant case. Officer Midkiff's question ("Is he going to show us where the body is?") is far from comparable to the "few offhand remarks" made by the officers in Innis. 446 U.S. at 303. As previously established on the record, Officer Midkiff's "sole purpose" in going to the interrogation room was to inquire about Petitioner's willingness to cooperate in locating the body. If he was truly not interested in eliciting a response from Petitoner, he could have simply asked Officer Davis to step away from the interrogation room, out of Petitioner's hearing, and then directed his question solely to Davis.

The State argues that Petitioner's response to Officer Midkiff was "unforeseeable;" that the Officer could not have known that Petitioner "had such a weak personality that he would totally collapse upon hearing one question..." Response, at p. 16. Officer Davis, however, understood the interrogative nature of that "one question"; he responded immediately by informing Officer Midkiff that Petitioner had requested an attorney. Yet, Officer Midkiff persisted by asking Petitioner directly where the body was. RT, August 27, 1982, at p. 46 (Appendix "B" to the Petition).

Even if this Court is not wholly convinced that Officer Midkiff's initial question to Officer Davis was the functional

equivalent to interrogation, the officer's follow-up questions regarding the body's location and requesting directions to the site constituted direct express questioning. That questioning was certainly designed to, and did, illicit incriminating responses from the Petitioner.

In the final paragraph of its Response, the State alludes to a possible assertion of the "inevitable discovery" doctrine of Nix v. Williams, ____U.S.____, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). The State cites the testimony of Officer Hackworth, who interviewed Petitioner's alleged accomplice, Martin Norton. Officer Hackworth testified that he interviewed Norton nine days after Petitioner led Officers Davis and Midkiff to the body. Officer Hackworth's report of the interview stated that Norton told him the victim's body had been thrown into a mine shaft "somewhere near" Salome, Arizona. RT, August 27, 1982, at p. 66 (Appendix "B" to the Petition). The officer, however, was not 100% sure that Norton told him that the mine shaft was located on property belonging to Petitioner's father. Id. at pp. 67-68. It was "possible" that Norton did not give him that information. Id. Officer Hackworth's conversation with Petitioner's parents also occurred after discovery of the body. Id. at pp. 64 and 69-70. Nothing in the record indicates that Petitioner's father knew anything about the whereabouts of the body before it was discovered. In fact, Officer Hackworth testified, "I believe it was new to him." Id. at p. 70.

The State concludes that, based on the foregoing testimony, the police would have located the body even if Petitioner had not led them to it. To the contrary, Officer Midkiff admitted that independent discovery "wasn't very likely," considering the desolate area, the number of deserted mines in the area and the position of the body, at the bottom of a mine shaft underneath boards and other debris. Id., at pp. 54-55.

In any event, Nix requires that the State bear the burden of proving, by a preponderance of the evidence, that evidence obtained by illegal police conduct would ultimately or inevitably have been discovered had no violation of constitutional rights occurred. This presupposes a determination of inevitable discovery after full evidentiary hearing on the issue before the trial court. This has not occurred in this case. Moreover, an inevitable discovery hearing could not effect any determination of this Court as to the inadmissibility of testimony regarding the Petitioner's statements or his conduct in leading officers to the site.

CONCLUSION

Despite the Arizona Supreme Court's professed application of Edwards, the record in this case establishes that no such application could have occurred. The record demonstrates: 1) that police officers interrogated Petitioner, expressly and impliedly, after his right to counsel had been invoked; 2) that police, and not Petitioner initiated the communication regarding the location of the body; and 3) that the State failed to allege, argue, or present any evidence of Petitioner's waiver of his rights and, in fact, conceded the issue. In essence, Petitioner's contention is not that the Arizona Supreme Court incorrectly applied Edwards, but that Edwards was not, in reality, applied at all.

RESPECTFULLY SUBMITTED this 20th day of September, 1984.

Paul F. Lazarus
ROBBINS & GREEN, P.A.
1800 United Bank
3300 N. Central Ave.
Phoenix, Arizona 85012
Attorneys for Petitioner

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

PAUL F. LAZARUS, being first duly sworn upon his oath, deposes and says:

That he served the attorney for respondent in the foregoing case by forwarding two copies of Reply on Petition for Writ of Certiorari, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

Jack Roberts
Attorney General of
the State of Arizona
1275 W. Washington, 2nd Floor
Phoenix, AZ 85007

this 20th day of September, 1984.

Paul F. Lazarus

SUBSCRIBED AND SWORN to before me this 20th day of September, 1984.

Connie S. Berrigan
Notary Public

My Commission Expires:

December 16, 1984

OPINION

SUPREME COURT OF THE UNITED STATES

STEVEN CRAIG JAMES *v.* ARIZONA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 84–5191. Decided November 5, 1984

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting from denial of certiorari.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 277 (1976), I would grant certiorari and vacate the death sentence in this case. Even if I felt otherwise, however, I would grant certiorari in this case because the underlying conviction raises grave constitutional issues.

I

At stake in this case are the limits the Fifth Amendment places on official custodial interrogation of an accused who has invoked the right to assistance of counsel. See *Solem* v. *Stumes*, —— U. S. —— (1984); *Oregon* v. *Bradshaw*, —— U. S. —— (1983); *Edwards* v. *Arizona*, 451 U. S. 477 (1981). Admitting certain incriminating evidence against petitioner James in this case, the Arizona trial court ignored the principles of *Edwards* and its progeny. To affirm the trial court, the Arizona Supreme Court applied *Edwards* and *Bradshaw* in a way that departs substantially from our intendment in those cases and merits plenary review. Because Arizona plans to execute James if this constitutionally infirm conviction stands, our responsibility to undertake review is clear.

II

On November 19, 1981, Phoenix police officers arrested James for the murder of Juan Maya. Shortly after the ar-

rest, Officer Davis of the Phoenix force escorted James to a small, windowless room and began an interrogation. Officer Davis read James his *Miranda* rights and then informed him that he would be charged with first degree murder. *Reporter's Transcript* [*Rep. Tr.*] 5–7 (August 27, 1982). About nineteen minutes into the interrogation, James asked Davis what would happen with respect to the murder charge. Davis responded that if James was found guilty the result would be up to the court. James appears to have perceived this statement as an intimation that capital punishment was possible, because at this point he made his first request for an attorney. *Rep. Tr.* 8–10 (September 3, 1982). Instead of terminating the interrogation, the officer continued to press James to make some kind of a statement; Davis told James he was "only trying to get the facts of the case and giving [James] the opportunity to tell his side of it too." *Ibid.* According to the subsequent testimony of Officer Davis, James' response was hesitant and uncertain. He first suggested he might be willing to proceed without an attorney but then reversed himself and requested an attorney once again. *Ibid.* This second request for an attorney prompted Officer Davis to pick up his papers, stand and open the door. As he opened the door he encountered Sergeant Midkiff, the officer supervising this investigation, who was standing just outside. *Id.*, at 11. As soon as he saw Officer Davis, Midkiff asked "is he going to show us where the body is?" *Rep. Tr.* 44 (August 27, 1982). Midkiff later testified that he stood close to James when asking this question. Midkiff also testified that James "might have assumed" the question was intended for him. *Id.*, at 52–53. Officer Davis and James responded to Midkiff's inquiry simultaneously. As Davis told Midkiff that James had invoked his right to counsel, James said "I'll show you where the body is." *Ibid.* Midkiff immediately asked James where the body was and James responded that it was approximately 100 miles from Phoenix. *Id.*, at 44–48. Neither officer made any effort to remind

James of his right to counsel and neither sought an express oral or written waiver of that right.

Instead of providing James with an attorney, the officers readied a police car for a trip to the site of Juan Maya's body. Sergeant Midkiff instructed all officers to refrain from questioning James while the car was being readied. *Id.*, at 57. Midkiff also phoned a prosecutor for advice on whether, in light of James' request for an attorney, the officers should proceed with the proposed journey. The prosecutor told Midkiff to proceed. Davis then escorted James to the patrol car and requested directions to the site of the body. *Id.*, at 55–56. James obliged and led Davis to an abandoned mine shaft about 100 miles from Phoenix. At the base of the shaft the officers found the body of Juan Maya. *Id.*, at 53–55.

At his trial for capital murder James sought to suppress the incriminating statements but the trial court held the statements admissible. James was convicted and sentenced to death. The Arizona Supreme Court affirmed the conviction and sentence. James then petitioned this Court for certiorari. While the petition was under consideration, the state of Arizona set James' excecution date for October 3, 1984. The Arizona Supreme Court denied a stay of execution pending this Court's disposition of the petition for certiorari. JUSTICE REHNQUIST granted a stay of execution to permit consideration of the petition.

III

When an accused in custody requests the assistance of counsel the Fifth Amendment requires that all "interrogation must cease until an attorney is present." *Miranda* v. *Arizona*, 384 U. S. 436, 474 (1966). To ensure that officials scrupulously honor this right, we have established in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), and *Oregon* v. *Bradshaw*, —— U. S. —— (1983), the stringent rule that an accused who has invoked his Fifth Amendment right to assistance of counsel cannot be subject to official custodial in-

terrogation unless and until the accused (1) "initiates" further discussions relating to the investigation, and (2) makes a knowing and intelligent waiver of the right to counsel under the standard of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), and its progeny. See *Solem* v. *Stumes*, —— U. S. —— (1984). Under this approach, an accused's initiating statement is admissible if it is voluntary and not made in response to interrogation, *Edwards*, *supra*, at 485–486, but the accused's subsequent responses to interrogation are admissible only if the accused has, after the initiation, made a knowing and intelligent waiver of the right to counsel.

In this case James twice invoked his right to counsel during the course of interrogation; James "expressed his own view" that he was "not competent to deal with the authorities without legal advice." *Michigan* v. *Mosely*, 423 U. S. 96, 110 n. 2 (WHITE, J., concurring). The statement he made only a few seconds after requesting counsel for the second time—"I'll show you where the body is"—was therefore properly admitted into evidence only if it was a voluntary initiation of new discussions. The follow-up colloquy that led to discovery of the body was properly admitted into evidence only if that statement was an initiation *and* if, prior to further official questions and James' responses to those questions, James knowingly and intelligently waived his previously invoked right to counsel.

1. "Initiation." Under the strict rule of *Edwards* and *Bradshaw* once an accused has invoked the right to counsel no further interrogation is permitted until the accused initiates a new dialogue with the authorities. *Solem* v. *Stumes*, *supra*, at ——. Sergeant Midkiff's query "Is he going to show us where the body is," though directed at Officer Davis, indisputably triggered James' statement "I'll show you where the body is." That James made the statement in response to Midkiff's inquiry is not, however, determinative of the "initiation" question. If Midkiff's inquiry is not viewed as interrogation for Fifth Amendment purposes, then James' response

might be a voluntary initiation of dialogue. Some official statements made within earshot of an accused in custody are not "interrogation" even if they prompt a response. In *Rhode Island* v. *Innis*, 446 U. S. 291 (1980), the Court held that:

> "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U. S., at 300–301 (footnotes omitted).

The *Innis* approach "focuses primarily upon the perceptions of the suspect," *id.*, at 301, and mandates inquiry into whether the words or actions of the authorities bring to bear any coercive pressure "above and beyond that inherent in custody itself." *Id.*, at 300. Consonant with the approach in *Miranda*, this inquiry "vest[s] the suspect with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *Id.*, at 301. This perspective is tempered, *Innis* makes clear, to the extent that the police ought not be "held accountable for the *unforeseeable* results of their words or actions." *Id.*, at 302 (emphasis added). In general, though, *Innis* defines interrogation broadly and flexibly in recognition of the enhanced coercive pressures that official words or conduct may impose on an accused in the "interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner." *Miranda*, *supra*, at 457.

At the suppression hearing, the state trial court made no findings as to whether James' statement was an "initiation" under *Edwards* or a response to interrogation as defined in *Innis*. The court merely concluded without explanation that

James had "knowingly, willingly, and voluntarily" made the statement. See *State* v. *James*, No. 5744 (Ariz. S. Ct. June 5, 1984) (quoting unpublished trial court minute order). Under *Edwards*, of course, a statement could be made knowingly, willingly and voluntarily and yet be inadmissible because the statement was obtained in response to interrogation occurring after an accused had invoked the right to counsel and absent any initiation of new dialogue by the accused. *Edwards*, *supra*, at 485 ("it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel"). Thus the trial court finding is of no relevance to the "initiation" inquiry that *Edwards* and *Bradshaw* mandate.

The Arizona Supreme Court endeavored to paper over this deficiency. Acknowledging the trial court's failure to make the requisite finding of initiation—and subsidiary failure to determine whether Midkiff's question was "interrogation" under *Innis*—the court held that such a finding was nonetheless "implicit" in the lower court decision. Ariz. S. Ct. Op., at 6. The following four assertions encompass the entirety of the state supreme court's justification for this divination of the "implicit" finding:

> "[1]There was uncontradicted testimony that James understood his rights. [2] There was uncontradicted testimony that Midkiff's question was meant solely for Davis. [3] Although the [trial] court did not employ all of the proper 'buzz words,' the record indicates that James made a decision to cooperate with the police without benefit of counsel and [4] his statement fits either definition of initiate in *Bradshaw*." *Ibid.*

Three of these stated reasons have no bearing on the determinative question whether James spoke the first incriminating words on his own initiative or in response to interrogation. That James knew his rights has no relevance to whether Midkiff's inquiry should be viewed as interrogation.

That James "made a decision to cooperate" is similarly irrelevant: if his "decision to cooperate" was prompted by interrogation occurring after he invoked his right to counsel, and absent an intervening "initiation," any cooperative statements he made are inadmissible under *Edwards*. The court's claim that James' statement was initiation "under either definition of the term in *Bradshaw*" is also inapposite to the "interrogation" aspect of the initiation analysis. In *Bradshaw* the plurality and dissent disagreed over how related to the subject of the investigation the initiating statement need be to justify resumption of official interrogation. The plurality suggested an expansive view of what might qualify as initiation, —— U. S., at ——, and the dissent proposed a much more circumscribed view. *Id.*, at —— (MARSHALL, J., dissenting). The statement in this case was sufficiently related under either view expressed in *Bradshaw* but this fact has nothing to do with whether the statement was made in response to interrogation.

The *only* potentially relevant reason the state court gave for perceiving an implicit finding of "initiation" was the purportedly uncontradicted testimony that Sergeant Midkiff directed his inquiry at Officer Davis and not at James. This assertion, even if valid, provides little support for the conclusion that James' statement was an independent "initiation." The proper inquiry under *Innis* is whether the official should know that the statement is reasonably likely to elicit an incriminating response from the suspect. *Innis*, *supra*, at 301. A bare finding that Midkiff directed his question to Davis and not to James is but the beginning of the *Innis* inquiry; had the officer directed the question to James, "interrogation" *vel non* would not be an issue. The question that must be answered under *Innis* is whether Midkiff's statement, though not aimed at James, should be viewed as the "functional equivalent" of interrogation in these circumstances because Midkiff should have known that the statement was reasonably likely to elicit an incriminating response

from the accused. *Ibid.* Relying only on the fact that Midkiff spoke to Davis and not James, the Arizona Supreme Court has done little more than restate the question under *Innis*.

That the Arizona Supreme Court could not salvage a plausible finding of "initiation" is perhaps not surprising. The facts demonstrate that from James' perspective Midkiff's question created significant coercive pressure over and above that inherent in custody itself. When Sergeant Midkiff asked his question he stood only a few feet from James in the interrogation room. Midkiff admitted at the suppression hearing that James "might have assumed" the question was meant for him, *Rep. Tr.* 52–53 (August 27, 1982), as well he might because the question sought information for which he had to have been the original source. Like many of the interrogation techniques deplored in *Miranda* for their tendency to overbear the will of an accused in custody, Midkiff's question presumed guilt and suggested to James that the purpose of the interrogation was simply to force him to accede to the inevitable. *See Miranda, supra*, at 450–451; *Innis, supra*, at 299. Projecting an air of confidence in the suspect's guilt is a recommmended interrogation tactic precisely because of the enhanced coercive pressure it brings to bear on a suspect. *See* Inbau & Reid, Criminal Interrogation And Confessions 26 (2d Ed. 1967).

The timing of Midkiff's question exacerbated its coercive impact. Occurring only seconds after Davis had completed his direct questioning, the Midkiff inquiry must have seemed to James simply one more question in the intensive interrogation to which he had been subjected up until a few seconds before. The enhanced coercive pressures of the direct questioning in the interrogation room were not likely to have dissipated in the few seconds between Davis' final question and Midkiff's question. Because James' first request for an attorney had not succeeded in cutting off interrogation, James would have had no reason to think that his second request

would be any more effective. Under these circumstances the statement "I'll show you where the body is" must be viewed as the product of compulsion produced by coercive pressures that were at least the functional equivalent of direct questioning.

Under *Innis*, only if Sergeant Midkiff could not reasonably have foreseen that the his question would prompt an incriminating response should the response be found to be a voluntary "initiation." The preceding discussion should make clear that the response of James was entirely foreseeable under the coercive circumstances then present. Nor is this a case like *Innis* in the sense that the authorities would have had no reason to foresee that their "few offhand remarks" would touch a peculiar psychological susceptibility in the accused and thereby evoke an incriminating response. *Innis, supra*, at 302–303. Midkiff should reasonably have foreseen that under the coercive circumstances then present his question to Davis was likely to evoke an incriminating response from even a veteran of the interrogation room.

At bottom, the "initiation" aspect of the *Edwards* test is meant to protect the Fifth Amendment rights of a suspect who has decided that he or she is not competent to handle the coercive pressures of custodial interrogation without a lawyer. The requirement of an "initiation" ensures that an accused has independently changed his or her mind about the need for a lawyer, and has not had his or her mind changed by the coercive pressure of continued direct questioning or its functional equivalent. In no sense can James be said to have made such an independent judgment.

2. "Waiver." Even if one accepts arguendo that James initiated the conversation about the location of the body, such a conclusion permits introduction at trial of only the initiating statement. *Edwards, supra*, at 485–486. Immediately after James made the first incriminating statement, Midkiff directly asked James where the body was. Whatever the status of Midkiff's first question to Davis, this question to

James and the follow-up questions as to the exact location of the body are interrogation under any definition. James' incriminating responses and their evidentiary fruits were properly admitted at trial only if James made a knowing and intelligent waiver of his previously invoked right to counsel. *Oregon* v. *Bradshaw*, *supra*. The test is that of *Johnson* v. *Zerbst:* indulging every reasonable presumption against waiver, was there a knowing and intelligent waiver in light of the "particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." 304 U. S., at 464.

The state trial court failed to apply the proper legal standard in evaluating whether the incriminating statements should be admitted. The court merely found that James "knowingly, willingly and voluntarily *made the statements*," Ariz. S. Ct. Op., at 6 (quoting unpublished trial court minute order) (emphasis added), and did not find that James knowingly and intentionally relinquished his right to counsel. Though the trial court's finding might suffice under the "voluntariness" standard of *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973), it falls short under the more exacting test of *Johnson* v. *Zerbst*.

The Arizona Supreme Court's efforts to rehabilitate the trial court on this issue are no more availing than were its similar efforts on the initiation question. The State Supreme Court held that a constitutionally sufficient finding of waiver was implicit in the trial court opinion. See *Ariz. S. Ct. Op.*, at 5–6. Though the analysis that led the court to this conclusion is not crystalline, the court appears to have found waiver because James knew his rights (he twice invoked them), was not subject to threats or promises, and made a conscious decision to cooperate, expressed in his *initiation* of dialogue with the authorities. *Ibid.* The opinion makes clear that the court found waiver implicit in the *initial* incriminating statement and not in anything James did or said subsequent to that initial statement. *Id.*, at 6.

This analysis cannot pass muster under *Edwards*. In every *Edwards* case that reaches the waiver stage of the analysis, the accused will have necessarily invoked the right to counsel and subsequently initiated a dialogue. If these two facts alone support an affirmative finding of knowing and intelligent waiver of the right to counsel, then the further requirement in *Edwards* and *Bradshaw* of an explicit finding of subsequent waiver becomes superfluous. *Bradshaw* made clear that "even if a conversation . . . is initiated by the accused, where reinterrogation follows, the burden remains on the prosecution to show that *subsequent events* indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." —— U. S., at —— (emphasis added). The court here pointed to no subsequent events in which James affirmatively indicated an intention to waive his right to counsel.

No fair reading of the facts of this case will support a finding of waiver. See *Fare* v. *Michael C.*, 442 U. S. 707, 726–727 (1979). This Court indulges a strong presumption against finding a waiver of the right to counsel, especially when the accused has not made such a waiver explicit. See *Miranda* v. *Arizona*, *supra*, at 475; *Johnson* v. *Zerbst*, *supra*, 304 U. S., at 464. That presumption should apply with particular force in this case because James was never reminded of his right to counsel after he allegedly initiated new discussions with Officer Davis and Sergeant Midkiff. This important circumstance distinguishes the present case from recent cases in which the Court has found a valid waiver of a previously invoked right to counsel. In both *Oregon* v. *Bradshaw*, *supra*, and *Wyrick* v. *Fields*, —— U. S. —— (1982), the police gave the accused a thorough reminder of his right to counsel prior to official reinterrogation after an initiation. See *United States* v. *Montgomery*, 714 F. 2d 201 (CA1 1983). While a prophylactic rule requiring such reminders in every case might be an appropriate safeguard of this core right, cf. *North Carolina* v. *Butler*, 441 U. S. 369,

377 (1979) (BRENNAN, J., dissenting), at the very least an especially strong presumption against finding waiver should apply absent such a reminder.

Because James never specifically indicated a waiver of his rights, a finding of waiver must be based on inference. If waiver is to be inferred on these facts it would have to be inferred solely from James' decision to respond to the questions that Midkiff and Davis put to him after he invoked his right to counsel. His first response to a direct question—Midkiff's inquiry about the location of the body—occurred only seconds after James had invoked his right to counsel and only a split second after he had purportedly "initiated" a new dialogue. *Rep. Tr.* 44–46 (August 27, 1982). Inferring waiver from the bare fact that an accused responded to interrogation is under any circumstances extremely dubious. *Edwards*, *supra*, at 484; *Miranda* v. *Arizona*, *supra*, at 474; *Carnely* v. *Cochran*, 369 U. S. 506, 516 (1962). And the instant circumstances simply will not support such an inference of a split-second change of mind in the coercive interrogation environment.*

Absent any specific affirmative signal of waiver, any thorough reminder to petitioner of his rights after initiation, and with only inferences from the fact that James responded to interrogation, I do not see how this Court can sanction a finding of waiver under these circumstances, particularly in a capital case. Declining review of so substantial a departure from *Johnson* v. *Zerbst* and its progeny, this Court shirks its primary role in reviewing the decisions of state courts "to make sure that persons who seek to *vindicate* federal rights have been fairly heard." *Florida* v. *Mayers*, —— U. S. ——, —— (1984) (STEVENS, J., dissenting) (quoting *Michigan* v. *Long*, 463 U. S. ——, —— (1983) (dissenting opinion) (emphasis in original). When a petitioner seeking vindication of a federal right risks execution if that right is not vindicated the responsibility to review is one this Court must accept.

*Midkiff and Davis certainly did not perceive James as having waived his rights under the circumstances. Midkiff instructed all officers not to question James and Davis testified that he deliberately avoided interrogating James because he thought he had a legal obligation to refrain. *Reporter's Transcript* 50–51 (August 27, 1982).

IV

Perhaps the Court is disinclined to review this case on the mistaken view that the case involves only the application of settled constitutional principle to the instant facts. I have made plain that I think clarification is needed with respect to the application of *Johnson* v. *Zerbst*, *supra*, to custodial waiver of the previously invoked right to counsel. More importantly, in the realm of constitutional protections of the accused the sensitivity to factual nuance that marks so many of our current doctrines requires this Court in the proper case to exercise its powers of review to correct egregious departures from the intendment of our precedents. Incessant reliance on the precept that review is unnecessary when a case involves no more than application of settled principles to fact risks draining our constitutional protections of all protective vitality. The present case illustrates the point. If the instant facts support a finding of initiation and waiver under *Edwards* v. *Arizona*, *supra*, then the protections set forth in that case are illusory. Only by granting review in aberrant cases such as this can the Court make clear that the tests set forth for deciding the bounds of the Constitution's protections of individual rights are meant not as manipulable technicalities in the service of empty slogans but as bulwarks of our most precious liberties.